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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1043

SAUL HELLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Questions Presented	2
Statutes Involved	2
Jurisdiction	3
Statement of the Case	3
Summary of Argument	13
Point I—The New York state courts properly applied constitutional standards in finding the film obscene	15
Point II—A judge may constitutionally issue a warrant directing the seizure of a film which he has seen in its entirety and which he has found to be obscene	26
Conclusion	45

TABLE OF AUTHORITIES

Cases:

A Quantity of Books v. Kansas, 378 U.S. 205 (1964) 30, 31, 32, 34, 35, 42
Adderly v. Florida, 385 U.S. 39 (1966) 33
Alexander v. Virginia, No. 71-1315 21
Astro Cinema Corp. v. Mackell, 422 F.2d 293 (2d Cir. 1970) 13, 34, 35

PAGE

Bethview Amusement Corp. v. Cahn, 416 F. 2d 410 (2d Cir. 1969), *cert. denied* 397 U.S. 910 (1970) 12, 13, 32
Brinegar v. United States, 338 U.S. 160 (1949) 27
Byrne v. Karalexis, 401 U.S. 216 (1971) 31, 39

Cain v. Commonwealth, 437 S.W.2d 769 (1969), rev'd, 397 U.S. 319 (1970) 18, 19
Cambist Films v. Duggan, 420 F. 2d 687 (3d Cir. 1969) 32
Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1968) 37
Carroll v. United States, 267 U.S. 132 (1925) 27
Chimel v. California, 395 U.S. 752 (1969) 41
Commonwealth v. State Amusement Corp., 356 Mass. 715, 248 NE 2d 497 (1969) 32
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 26
Cox v. Louisiana, 379 U.S. 559 (1965) 33

Demich, Inc. v. Ferdon, 426 F. 2d 643 (9th Cir. 1970), rev'd on other grounds, 401 U.S. 990 (1970) 32, 36

Freedman v. Maryland, 380 U.S. 51 (1965) 35, 39, 40

Ginzberg v. United States, 383 U.S. 463 (1966) ..18, 20, 21, 22
Giordenello v. United States, 357 U.S. 480 (1958) 26

Heller v. New York, 406 U.S. 916 (1972) 3

Jacobellis v. Ohio, 378 U.S. 184 (1964) 16, 22, 23
Johnson v. United States, 333 U.S. 10 (1948) 26
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 35

Kaplan v. California, No. 71-1427 21
Karelexis v. Byrne, 306 F.Supp. 1363 (D. Mass. 1969), rev'd on other grounds, 401 U.S. 216 (1971) 18, 21
Ker v. California, 374 U.S. 23 (1963) 27
Kingsley Arms, Inc. v. Brown, 354 U.S. 436 (1954) 11, 39
Kovacs v. Cooper, 336 U.S. 77 (1949) 33

PAGE

Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd, 388 U.S. 456 (1967) 19
Lee Art Theatres, Inc. v. Virginia, 392 U.S. 363 (1968) 28, 29, 31
Locke v. United States, 11 U.S. (7 Cranch) 339 (1813) 27

MOD Amusement Corp. v. Murphy, 335 F. Supp. 1267 (S.D.N.Y. 1971), motion for stay denied, January 12, 1972 (2d Cir.) 31
Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) 16
Marcus v. Search Warrant, 367 U.S. 717 (1961) 14, 27, 28, 29, 31, 34
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 16, 22
Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970) 27
Metzger v. Pearcy, 393 F. 2d 202 (7th Cir. 1968) 32
Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), aff'd *sub nom.*, New York Feed Co., Inc. v. Leary, 397 U.S. 98 (1970) 16
Mishkin v. New York, 383 U.S. 502 (1966) 20, 22, 31

Near v. Minnesota, 283 U.S. 697 (1931) 25

Overstock Book Company v. Barry, 436 F. 2d 1289 (2d Cir. 1970) 16

Paris Adult Theater I v. Slaton, No. 71-1051 21
People v. Abronovitz, 31 N.Y. 2d 160 (1972) 28, 29
People v. DeRenzy, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969), hearing denied by Calif. Sup. Ct. Sept. 24, 1969 27
People v. Fritch, 13 N.Y. 2d 119 (1963) 19
People v. G. I. Distributors, 20 N.Y. 2d 104 (1967) 19
People v. Heller, 29 N.Y. 2d 319 (1971) 13
People v. Luros, 4 Cal. 3rd 84, 92 Cal. Rptr. 833 (1971) 27
People v. Morgan, 68 Misc. 2d 667, 326 N.Y.S. 2d 976 (Crim. Ct. N.Y. Co. 1971), aff'd, N.Y.L.J. Jan. 18, 1972, p. 2, col. 3 (App. Term, 1st Dept.) 43

PAGE

People v. Noroff, 67 Cal. 2d 791, 63 Cal. Rptr. 575 (1967) 19
People v. Richmond County News, 9 N.Y.2d 578 (1961) 19
People v. Rothenberg, 20 N.Y.2d 35 (1967) 28, 29
People v. Shiffrin, 64 Misc. 2d 311 (Crim. Ct. N.Y. Co. 1970) 38
People v. Steinberg, 60 Misc. 2d 1041, 304 NYS2d 858 (Co. Ct. West. Co. 1969) 44

Rage Books, Inc. v. Leary, 301 F. Supp. 546 (SDNY 1969) 44
Redrup v. New York, 386 U.S. 767 (1967) 16, 19, 21
Roaden v. Kentucky, 473 SW 2d 814 (Ky. 1971), *cert. granted* 406 U.S. 905 (1972), No. 71-1134 ..... 3, 32
Roth v. United States, 354 U.S. 476 (1957) ..13, 16, 22, 23, 24

Schackman v. Annebergh, 258 F.Supp. 983 (C.D. Cal. 1966) 27
Smith v. California, 361 U.S. 147 (1959) 14, 23, 33
Stanley v. Georgia, 394 U.S. 557 (1969) 20, 21, 22, 23
State v. Albini, 31 Ohio St. 2d 27, 285 NE 2d 327 (1972) 32, 38
State v. Burgin, 255 S.C. 237, 178 SE 2d 325 (1970), rev'd on other grounds, 404 U.S. 806 (1971) 32
State v. Rabe, 79 Wash. 2d 254, 484 P.2d 917 (1970), rev'd on other grounds, 405 U.S. 313 (1972) 32
Street v. New York, 394 U.S. 576 (1969) 33

Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) 39, 40
Time Film Corp. v. Chicago, 365 U.S. 43 (1961) 35
Tinker v. Des Moines School District, 393 U.S. 503 (1959) 33
Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969), *cert. denied*, 396 U.S. 985 (1969) 32

PAGE

United States v. A Motion Picture Film Entitled "I Am Curious (Yellow)," 404 F.2d 196 (2d Cir. 1968) 18
United States v. Alexander, 428 F.2d 1169 (8th Cir. 1970) 32
United States v. Lefkowitz, 285 U.S. 452 (1932) 26
United States v. O'Brien, 391 U.S. 367 (1968) 14, 32
United States v. Pryba, 312 F. Supp. 466 (D.D.C. 1970) 27
United States v. Reidel, 402 U.S. 351 (1971) 21, 22
United States v. 35mm Motion Picture Film Entitled "Language of Love," 432 F.2d 705 (2d Cir. 1970), *cert. granted sub nom.*, United States v. Unicorn Enterprises, Inc., 401 U.S. 907 (1971), *cert. denied*, 403 U.S. 925 (1971) 16, 18
United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 22, 40
United States v. Ventresca, 380 U.S. 102 (1965) 27

Wagenheimer v. Maryland State Board of Censors, 255 Md. 297, 258 A.2d 240 (1970), aff'd *sub nom.* Grove Press, Inc. v. Maryland State Board of Censors, 401 U.S. 480 (1971) 18
Warden v. Hayden, 387 U.S. 294 (1967) 27

Younger v. Harris, 401 U.S. 37 (1971) 31

Statutes and Constitution:

Acts of and Laws of the Province of Massachusetts Bay, c. CV, §8 (1712), Massachusetts Bay, Colony Charters and Laws (1814) 24

Laws of New York, 1972, chap. 826 11

N.Y.C. Criminal Court Act §40 4

N.Y. Civil Practice Law and Rules §6330 11

PAGE

N.Y. Penal Law §235.00 ..... 2, 16, 17, 24

N.Y. Penal Law §235.05 ..... 1, 3

N.Y. Penal Law §235.15 4

28 U.S.C. §1257(3) 3

U.S. Constitution
First Amendment ..... Passim
Fourth Amendment 14, 26, 27, 29, 30
Fourteenth Amendment 26

Other Authorities:

American Law Institute, Model Code of Pre-Arraignment Procedure, Prop. Off. Draft No. 1, 1972, §§SS200.6 42

Commission Staff Notes, Proposed New York Penal Law, Thompson ed. (1964) 16

Denzer and McQuillan, Practice Commentary, N.Y. Penal Law §235.00 16

Model Penal Code, Prop. Off. Draft 1962, §251.4(1) 16

Motion and Brief of Charles Keating, Amicus Curiae, Roaden v. Kentucky, No. 71-1134 36

Note, The Prior Adversary Hearing: Solution to Procedural Due Process in Obscenity Seizure, 46 N.Y.U.L. Rev. 80 (1971) 27, 36

Petition for Certiorari, Lee Art Theatres, Inc. v. Virginia, 392 U.S. 362 (1968) 29

Report of the Commission on Obscenity and Pornography, Government Printing Office, 1970 ..... 23, 24, 25

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BRIEF FOR RESPONDENT

Preliminary Statement

The writ of certiorari has been issued to review a judgment of the Court of Appeals of the State of New York, entered December 1, 1971, which affirmed a judgment of the Supreme Court of the State of New York, Appellate Term, First Judicial Department, entered July 15, 1970, which affirmed a judgment of the Criminal Court of the City of New York, New York County, rendered September 17, 1969, convicting petitioner, Saul Heller, of obscenity (N.Y. Penal Law §235.05), and sentencing him to pay a fine of two hundred fifty dollars or to serve thirty days in jail. The fine was paid.

Questions Presented

Whether the New York courts properly applied constitutional standards in judging the film "Blue Movie" obscene.

Whether a state judge who has seen a film which he finds obscene may issue a search warrant for its seizure without conducting a prior adversary hearing on the issue of obscenity.

Statutes Involved

N.Y. Penal Law §235.00 Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

N.Y. Penal Law §235.05 Obscenity

A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity is a class A misdemeanor.

Jurisdiction

The petitioner sought review invoking 28 U.S.C. Section 1257 (3); the respondent concurred in his request. Certiorari was granted on May 15, 1972 and the case was set for argument together with *Roaden* v. *Kentucky,* No. 71-1134. *Heller* v. *New York,* 406 U.S. 916 (1972).

Statement of the Case

On July 31, 1969 Judge Goldberg of the Criminal Court of the City of New York attended a performance at the Garrick Theater in Manhattan, at the request of an assistant district attorney. The New York City Police Department Deputy Inspector accompanying the judge purchased the tickets to a regularly scheduled showing of the film "Blue Movie." About 100 other persons were in the

theater. Neither the judge nor the inspector recalled any signs restricting admission to adults (Goldberg: 10a-14a; Smyth: 19a, 30a).*

The judge saw the entire two-hour movie without discussing it with anyone. Immediately after stepping outside the theater, Judge Goldberg signed a search warrant for the seizure of the film, and warrants for the arrest of the theater manager, the projectionist and the ticket-taker (Goldberg: 10a, 11a, 14a-15a; Smyth: 20a-21a, 27a, 30a). No one at the theater was notified or consulted prior to the issuance of the warrants (Goldberg: 17a). The warrants were signed because "it was, and is my opinion that that film is obscene, and was obscene as I saw it then under the definition" (Goldberg: 10a).

One reel of film still in the projector and the only two other reels of film in the projection booth were seized (Smyth: 27a-29a). The petitioner, Saul Heller, the theater manager, was arrested, as were Epstein and Kern, the persons described in the two other arrest warrants.

No pretrial motions were made for the return of the film or for its suppression. The cases against the ticket-taker and projectionist were dismissed on the motion of the prosecutor (5a).** On September 16 and 17, 1969 the trial was held before a panel of three judges [see N.Y.C. Crim. Ct. A. §40]; there was no request for a jury trial.

The People's proof at trial consisted of testimony concerning the arrests and seizure. The seized film was shown

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* References are to the pages of the appendix.

** In an amendment to N.Y. Penal Law §235.15, effective July 2, 1971, it was made on affirmative defense to an obscenity change that the defendant is merely a salaried "projectionist * * * cashier, doorman, [or] usher."

to the trial judges (35a-37a). The following summary of the film's contents was prepared by counsel for respondent for this Court's convenience.

"Blue Movie" consists of three reels of color film which run for more than one hour and forty-five minutes. The splices between different camera angles or different scenes are noticeable, both audibly and visually. Large sections of the sound track are unintelligible or non-existent. The trial judges indicated that they could not understand the sound and at points remarked that "the sound is dead • • • although we can observe the actors are talking to each other" (36a).

The movie appears to be divided into five major sections —pre-coital, intercourse, post-coital, dinner and shower scenes.

The film begins without any titles or credits and the only actors in the film appear fully clothed—the female in pants and a diaphanous blouse, the male in a shirt, a pair of pants and socks—on a set which consists solely of one large bed. During the extended pre-coital scenes, approximately 35 minutes, the actors begin to undress, lie in bed and play with each other. During this petting sequence, the actors fondle each other, undress completely and continue fondling each other while the center of attention shifts from the upper body to the genitalia. The actors' genital regions are explicitly shown as they repeatedly manipulate each other's genital organs.

Throughout the entire scene the actors converse on diverse topics concerning a variety of mundane topics—*e.g.*, what they did during the past week, with whom they had

previously had intercourse, impressions of mutual friends. Some of these conversations are not understandable because of the poor quality of the sound track.

The actors then engage in several acts of real or simulated intercourse. One scene displays the female astride the male fondling his penis and then attempting to insert the semi-erect organ into her vagina. After turning to a male-superior position, shown in a sequence with the camera turned toward the couple from between their feet, the copulating couple turns so that the male is portrayed in profile on top of the female actively engaged in an act of intercourse. During these scenes, the camera is stationary and there is no close-up photography. However, the actors do express an awareness of the existence of the camera by commenting on it during their continuing disjointed conversations.

During the entire post-coital period, approximately twenty-five minutes, the two participants are pictured unclothed and fondling each other's genital organs. Their genital regions are explicitly shown. The couple engage in conversation, which is sometimes hard to hear because the sound is distorted; the topics discussed range from the Vietnam War to the qualifications of Mayor Lindsay. The topics shift, follow no particular pattern, show no insight, few ideas, and resemble the thoughts in newspaper headlines.

Finally, the couple undress and shower themselves. During this sequence, approximately twenty minutes, the actors are explicitly shown engaging in mutual manual genital stimulation. The camera "technique" shifts from

static single-distance pictures to a series of close-ups of portions of the male and female anatomy. Several acts of either actual or simulated intercourse occur in the bathtub, while the couple sing a "song" whose only clearly identifiable line is "down on me." At the end, during actual or simulated intercourse, they make loud animal noises. There are no closing titles or credits.

The first defense expert witness at trial, Parker Tyler, a 65-year-old author of six books about motion pictures, who had occasionally written magazine articles and had lectured about films, had seen "Blue Movie" about a year before the trial and had written an eight-page chapter about it in one of his books. The movie, produced by Andy Warhol, "represents what might be called the attitude of the cool world toward sex" (59a, 60a, 64a-65a). The "cool world" is "an attitude of indifference to the emotions, of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it is mixed in with conversation, gossip, it is no more than a diversion, a distraction" (60a, 67a). This attitude is displayed "through the acts" and the topic of conversation is "irrelevant and immaterial." There is no story line or plot line (65a); the dialogue in Warhol films is usually improvised (69a). The witness did not find the movie "sexually stimulating" or "lewd," agreeing that "the picture that merely titillates * * * is lewd, but a picture that actually shows copulation is not lewd" (68a). The "spirit" of the picture and the fact that "the woman seems quite bored [and] gives very little cooperation to the man" distinguishes the film from the "sexploitation" movies (70a-71a).

The term "blue movies" has a special meaning in the motion picture industry; in "common parlance" the term applies to "stag movies" (Tyler, 61a-62a; *see also,* Winick, 83a). In the advertising the film was called "Blue Movie" although the original name was "Fuck" (Tyler, 62a-63a).

The second expert, Charles Winick, a 47-year-old professor of sociology at the City University of New York, who had been a consultant to numerous commissions studying the effects of mass communications on children, and who had written numerous articles and books, testified that in his opinion "Blue Movie" had a social value (78a-80a); it shows "a growing and important point of view about sexual behavior * * * a film which enables people to explore their own attitudes in a constructive way," and "it has a certain amount of clinical interest in the presentation of two different character types, a non-responsive woman * * * and an aggressive fellow" (78a). The movie showed that the woman was not cooperative "to the extent that her boy friend appeared to wish" (91a-94a).

Because of the lack of closeups the witness was uncertain whether there was actual penetration during the intercourse scene. However, "I would say that it is likely that in fact they had engaged in sexual intercourse." He would also say that it was the intention of the film to convey the impression that they had (80a). The movie has value in clinical classes at medical school or for psychiatric residents. At first the witness stated he would not present it to a college-age group; he later changed his mind (91a-92a). Since the sex act was presented without frills, and was portrayed realistically, Dr. Winick's "own feeling is that it would clearly be a sexual depressant"; "a realistic showing of

an act of intercourse would not titillate the public" (79a, 82a, 97a-100a). The conversation between the actors does not "lend credence to the socially redeeming value," but shows the actual discontinuity of topics that are discussed during intimate moments; the particular topics discussed "is extremely important" (85a-86a). The actors showed a consciousness of being filmed; indeed, on occasion they spoke about the movie or a particular camera angle; thus the audience identifies "with the artist and the [film's] director" (86a-89a). The movie emphasizes the realism in the incident, without accenting the highs and lows of the sexual experience (85a, 89a, 90a). The uneven sound track and occasional lack of focus help convey a sense of reality (96a).

The final defense expert, Thomas Phillips, a 27-year-old writer for radio station WQXR and various publications, testified that he had written an article about "Blue Movie" for The Village Voice; he believed that the movie had social value, that is, it was "about the political and social situation in this country today" (106a-107a, 128a-130a). The movie conveyed the actors' disaffection with society and their "powerlessness" to control it; their solution was "to stay home, to refuse to contend with the situation and to find what happiness you can in private personal relationships" (107a, 110a, 118a-124a). The sound track was designed to be partly inaudible because it portrayed realism; "it is a technique that is used quite a bit" (108a-109a). The witness noted that the film contained "a great deal of conversation" (111a). However, there is "an organic connection between the sexual intercourse scene and the political scene. To express it very succinctly, * * * I think

the sexual intercourse was an emblem of the alternative of struggling against corruption and disorder in society" (114a-115a). "It was a very benign view of sexual intercourse in a friendly case" [*sic*] (115a). In response to a question from the Presiding Judge, "Could you say that the * * * photographic depiction of the intercourse, and the manipulation of the male's private organ, was a tasteful way of showing the actors' dissent with taxes, war and politics?", the witness replied, "I think that it was a tasteful way * * * and more tasteful than the sex scenes one generally sees in movies which do not include genital organs [because] * * * it was so realistic that it was relatively normal compared to the hysteria and exaggeration that appear in the cleverly censored sex films" (123a).

The petitioner, Saul Heller, testified that he had been the manager of Andy Warhol Garrick Theater for two years. He stated that when "Blue Movie" was playing at this theater there had been a sign at the box office with an "X" and a notice that "says no one under 17 admitted" (132a, 134a). Mr. Heller instructed each of the employees —ticket cashiers and ushers—that persons obviously under 18 years old were to be excluded unless they had identification showing their true age (134a-135a). He had seen the picture before his arrest (137a).

At the end of the People's case and at the end of the entire case petitioner moved to dismiss, emphasizing the alleged constitutional deficiency in the search-and-seizure procedure which did not provide a prior adversary hearing. The petitioner was found guilty by a unanimous court, which rendered the following opinion:

> "It is the conclusion of the Court that the motion to dismiss is denied, that the defendant is found guilty.

"We would like to call to your attention, that with respect to the due process clause violation urged by Counsel, that there was a judicial scrutiny by a judge of this Court prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the United States Supreme Court.

"With respect to the absence of adversary proceeding as provided in the Code of Criminal Procedure, Section 22a, [*] I think we are in agreement, Counsel has indicated there is no provision for an adversary proceeding under that section with respect to motion picture films.

"We find that the motion picture in question is hard core pornography, see People versus Richmond County News [9] New York 2nd 578. Hard core pornography is obscene by any standard, see Womack versus United States 294 F. 2nd at pages 204 and 206. Sexual activity between male and females graphically portrayed absent any social justification or excuse is obscene. See the decision in People versus G.I. Distributors at 20 New York 2nd 104 under the test for obscene which modifies the Roth decision alluded to by Counsel, we have the case of Memoirs versus Massachusetts commonly called the Fanny Hill case at 383 U.S. 413, and as far as the matter there, in issue, one of the tests that are in issue here is whether the work and material in question has redeeming social value.

* The statute [currently codified as N.Y.C.P.L.R. §6330] referred o by the trial court provided, at the time of the instant trial, for an njunctive procedure to prevent distribution of any "book, magazine, amphlet, comic book, story paper, writing, paper, picture, drawing, hotograph, figure, image on any written or printed matter of an indeent character, which is obscene, lewd, lascivious, filthy, indecent or isgusting." This Court has upheld the constitutionality of the procedure set forth in that statute. *Kingsley Arms, Inc.* v. *Brown*, 354 U.S. 436 (1954). By an amendment effective August 31, 1972, the tatute has been changed to include a "motion picture" as a subject of n injunction proceeding. Laws of New York 1972, chap. 826.

> That statement in the Memoirs case, the Fanny Hill case, is that the work in question must be utterly without redeeming and emphasizing redeeming, redeeming social value. The expert testimony in this case presented by the defendant is not persuasive." (158a-159a).

The petitioner was thereafter sentenced to pay a fine of $250 or to serve thirty days in jail. He paid the fine.

On appeal to the Appellate Term, Heller contended that the film is not obscene. He also argued that the film should not have been seized pursuant to a search warrant because he was not given an opportunity for an adversary hearing prior to the issuance of the warrant.

The Appellate Term, which had viewed the film, affirmed the conviction, without opinion (179a). One justice dissented on the ground that the film was not obscene (179a-180a).

On appeal to the New York Court of Appeals, petitioner again argued that an adversary hearing rather than an *ex parte* judicial determination is necessary before a search warrant for an obscene film may be issued and the movie seized. He also asserted that "Blue Movie" is not obscene.

The Court of Appeals viewed the film. The five-judge majority found it to be obscene. The majority also rejected the argument that this Court's previous decisions mandate an adversary hearing prior to the issuance of a search warrant for allegedly obscene films, particularly where the issuing magistrate has personally seen the film in question. The contrary view of the United States Court of Appeals for the Second Circuit in *Bethview Amusement Corp.* v. *Cahn*, 416

F.2d 410 (1969), *cert. denied* 397 U.S. 920 (1970) and *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (1970), was rejected as "beyond any requirement imposed on State courts by the Supreme Court." *People* v. *Heller*, 29 N.Y.2d 319 (1971) [181a-185a]. The two-judge dissenting opinion, written by the Chief Judge, said that the film is not obscene; therefore, the search-and-seizure issue need not be reached (185a-186a).

Summary of Argument

New York's explicit statutory definition of obscenity fully complies with this Court's decisions and incorporates each element of the established three-fold test. "Blue Movie," as seen by the state trial court and appellate judges, falls within the category of material that is not protected under First Amendment: it appeals to prurient interest in sex, it is patently offensive as measured by contemporary community standards, and it is utterly without redeeming social value.

The right of an individual, in his own home, to see obscene films does not carry with it the right of a commercial exhibitor to show an obscene film, even if the showing is neither pandered to an unwilling public nor offered to juveniles. The Court has consistently recognized a State interest in controlling obscenity. The historical analysis in *Roth* v. *United States*, 354 U.S. 476 (1957), overwhelmingly established that the First Amendment does not limit that interest. The recent studies on the effects of obscenity raise questions of policy appropriate for legislators; they do not undercut the valid State interest in preventing the dissemination, even to consenting adults, of obscenity.

The issuance of a search warrant for the seizure of an obscene film by a magistrate who has seen a public exhibition of the movie fully complies with Fourth Amendment requisites. The procedure ensures that there is more than probable cause to believe that a crime has been committed, and does not rely upon the opinions or conclusions of a police officer. When the judge sees the entire film, he can "focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717 (1962). Nor does the First Amendment require a prior adversary hearing. Contrary to the view of lower federal courts, this Court has not required adversary hearings prior to the issuance of a warrant for the seizure of a single film for use as evidence at a criminal trial. This Court's decisions require that prior adversary hearings are necessary, if at all, only for massive seizures of possibly protected material.

It is well settled that if a government may validly regulate a non-protected area (such as obscenity or draft cards), minor, incidental infringements on possible First Amendment rights of expression are permissible. *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Smith* v. *California*, 361 U.S. 147, 154-156 (1959). Since the State may validly regulate obscenity, which is not protected, it may use a form of regulation that is carefully controlled to prevent more than mere, incidental interference with protected material. In determining whether regulation of obscenity requires an adversary hearing prior to a seizure of a film pursuant to a warrant, there must be a balancing between possible harm to protected speech by the mistaken seizure of non-obscene material, and possible harm to valid regulation of obscenity by imposition of additional hearings or prohibition of seizure.

Adversary hearings prior to the issuance of search warrants would not safeguard protected speech, preventing erroneous seizures of non-obscene films, more than the New York procedure does. Once the magistrate has seen the film, the factual issues are resolved and argument by counsel of each side is not of much value. The legal issues can be resolved by prompt post-seizure hearings. On the other hand, prior adversary hearings lead to delay in the initiation of charges and in their prompt disposition. Additionally, evidence of a defendant's guilt on a particular date—the film itself—must be preserved; prior hearings—or their alternative, no seizures—present a major obstacle to this. There is a ready alternative for the exhibitor, replacement of the film with another print. If, as here, the record does not exclude that alternative, no finding of undue intrusion by the State is supportable.

POINT I

The New York state courts properly applied constitutional standards in finding the film obscene.

The trial court and two state appellate courts, after each saw the entire film, found that "Blue Movie" was obscene under the New York Penal Law. Petitioner contends that the movie, although "banal," is not obscene; however, he presents nothing to establish that claim. The state courts properly applied the statutes and constitutional law that govern the case.

The New York obscenity statutes, drafted to codify the Court's holdings as to the scope of possibility obscenity,

contain the proper ascertainable standards of guilt. As it applies to this case, N.Y. Penal Law §235.00 (reproduced at p. 2, *supra*) provides that for material to be "obscene" the prosecution must establish that (a) the dominant theme of the material taken as a whole appeals to prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. The draftsmen of the statute thus incorporated the three-fold test which they ascertained in this Court's opinions. See *Redrup* v. *New York*, 386 U.S. 767 (1967); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966); *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964); *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962); *Roth* v. *United States*, 354 U.S. 476 (1957); *cf. United States* v. *35mm Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705 (2d Cir. 1970), cert. granted *sub nom. United States* v. *Unicorn Enterprises, Inc.*, 401 U.S. 907 (1971), cert. dismissed 403 U.S. 925 (1971). See Denzer and McQuillan, *Practice Commentary*, N.Y. Penal Law §235.00; see also Commission Staff Notes, Proposed New York Penal Law, Thompson ed. (1964), notes to article 240, p. 385; Model Penal Code (Prop. Off. Draft 1962), §251.4(1). "That §235.00 of the New York Penal Law conforms to the standards of *Roth* and the cases following that decision is beyond question." *Overstock Book Company* v. *Barry*, 436 F.2d 1289, 1293 (2d Cir. 1970); accord *Milky Way Productions, Inc.* v. *Leary*, 305 F.Supp. 288 (S.D.N.Y. 1969) (three-judge court), aff'd *sub nom. New York Feed Co., Inc.* v. *Leary*, 397 U.S. 98 (1970). Thus, "obscenity" as defined by the New York Legislature em-

braces only matter that has been held to be beyond the purview of the First Amendment.

The state courts' conclusion that the film they saw falls outside the ambit of the Constitution's protection is amply warranted. The film portrays acts of sexual intercourse interspersed with irrelevant dialogue. There are incidents such as acts of sexual intercourse in a bathtub, the manipulation of the male's genital organ by the female in the shower "rais[ing] it from a flaccid state to at least a semi-erect state" (see 93a), and actual intercourse (see 80a) on the bed where "the audience saw the female astride the male, and assisting his erect penis into her vaginal area" (see 113a). The entire picture is devoted to sexual activity in such a way that the court cannot be faulted for concluding that the film, as its title suggests (61a-63a), appealed "to prurient, shameful or morbid interest in nudity [or] sex," and that it went "substantially beyond customary limits of candor in describing or in presenting such matters." N.Y. Penal Law §235.00(1).

And the finders of the facts, having heard the experts presented by the defense, rejected their testimony, stating that it "was not persuasive" (159a), and concluded that the film "is utterly without redeeming social value." Penal Law §235.00(1). The experts claimed to find that value of the film was in either its presentation of the "cool world's" attitude toward sex (Tyler), its view about sexual behavior (Winnick), or its presentation of the political and social situation (Phillips). The trial court could have rejected these alternative theories, finding them to be no more than an attempt to find a use for the rambling, random "dia-

logue" in what would otherwise be a "stag film." Unlike the movie in *United States* v. *A Motion Picture Film Entitled "I Am Curious (Yellow),"* 404 F.2d 196 (2d Cir. 1968), where the court found an idea in the film and an attempt at artistic presentation, the film in question here has no such values. Indeed, even a movie such as "I Am Curious (Yellow)," which has a plot, and, as the Second Circuit held, redeeming social value, has been held to lack such value and to be obscene in some jurisdictions. *Wagenheimer* v. *Maryland State Board of Censors,* 255 Md. 297, 258 A.2d 240 (1970), aff'd *sub nom. Grove Press, Inc.* v. *Maryland State Board of Censors,* 401 U.S. 480 (1971) (equally divided court); see also *Karelexis* v. *Byrne,* 306 F. Supp. 1363 (D. Mass. 1969) (three-judge court), rev'd on other grounds, 401 U.S. 216 (1971). It is clear from the film itself that there is no predominant theme in "Blue Movie," except for the depicting of sexual acts. But even the physical acts do not have the redeeming value of being instructive or informative, as in *United States* v. *35mm. Motion Picture Film Entitled "Language of Love." supra,* a case in which this Court granted the Government's peition for certiorari to review the finding that the film was protected. The film, "Language of Love," although more explicit in its depiction of physical sexual contact than "Blue Movie," was "not characterized by the forbidden 'leer of the sensualist.' *Ginzberg* v. *United States,* 383 U.S. 463, 468 (1966)." 432 F.2d at 712. Nor does "Blue Movie" merely show titillating pictures of portions of the bodies of "actors" engaged in intercourse or merely display photographs of naked women, which the Kentucky Supreme Court found obscene in "I, A Woman." *Cain* v. *Commonwealth,* 437 S.W.2d 769 (1969). Thus this Court's *per curiam* reversal in *Cain,* simply citing

Redrup v. *New York, supra,* does not mean that the instant film is not obscene. *Cain* v. *Kentucky,* 397 U.S. 319 (1970).

Indeed, "Blue Movie" is much like "Un Chant d'Amour," which was held to be obscene in *Landau* v. *Fording,* 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd, 388 U.S. 456 (1967), overruled on other grounds, *People* v. *Noroff,* 67 Cal. 2d 791, 63 Cal. Rptr. 575, 576 (1967). Despite some expert testimony that the film dealt with prison problems, the California courts, as affirmed by this Court, upheld the conviction. There, as here, "none of the witnesses produced could agree on its dominant theme." 54 Cal. Rptr. at 182. The pictures here and in *Landau* also have some similarity because they are both by men whose other works have some artistic value—"Un Chant d'Amour" was by Jean Genet, "Blue Movie" by Andy Warhol. But as the California court rejected Genet's prominence as a defense, noting, "the artistic merit of Genet's other works does not provide a carte blanche when he chooses to venture in the fields covered by the film" and that "great artists can create the type of hard core pornography proscribed" [*Landau* v. *Fording,* 54 Cal. Rptr. at 182], so did the trial court here reject Warhol's.

The trial court here found "that the motion picture in question is hard core pornography" (159a). Apparently the reference to "hard core" pornography is to the New York case law, handed down prior to the enactment of the 1967 Penal Law, which held that only "hard core" material was proscribed. See *People* v. *Richmond County News,* 9 N.Y.2d 578 (1961); *People* v. *Fritch,* 13 N.Y.2d 119 (1963); *People* v. *G.I. Distributors,* 20 N.Y.2d 104 (1967). That standard "delimits a narrower class of con-

duct than that delimited under the *Roth* decision." *Mishkin* v. *New York*, 383 U.S. 502, 506 (1966). Under either the "hard core" test or under the established, broader tests of obscenity "Blue Movie" is obscene.

Petitioner never challenged the findings that he "promoted" the film or that he produced an obscene "performance," and that he knew the film's contents. Accordingly, his guilt of the crime of obscenity was established and the state court's finding on this issue is correct.

Petitioner relies upon *Stanley* v. *Georgia*, 394 U.S. 557 (1969), apparently arguing that since adults could possess obscenity in their own home, "it is a logical next step to prohibit any seizure of a movie such as the one at bar which is not being pandered or exploited and which is not available to children or anyone else, except those willing to pay about $5 to see it" (brief, p. 21). The record, however, is inadequate for a decision on this question. For although petitioner himself testified that there were signs and instructions to his employees to exclude minors (133a-138a), both prosecution witness, the judge and inspector, denied any recollection of any signs (Goldberg, 14a; Smyth, 30a-31a) thereby casting doubt on petitioner's self-serving testimony. There is an absence of any finding of fact as to whether minors were excluded.

Similarly, there was no finding at the trial as to the content or manner of the advertising. Since the prior decisions of this Court have held that "pandering" is not a necessary element in any obscenity prosecution, but is merely to be a factor to be considered on the issue of obscenity *vel non* in a close case [see *Ginzberg* v. *United*

States, 383 U.S. 463 (1966); *Redrup* v. *New York, supra*], the prosecution offered no proof on the subject. That some facts on this subject could have been developed was established by the defense witness, Tyler, who testified that the original name of this film was "Fuck," but that it was changed in the advertising to "Blue Movie"—a name meaning, "in common parlance," "stag movies" (61a-63a). The absence of an adequate record here suggests that the issue posited by peitioner be decided in other cases.* *Cf. United States* v. *Reidel,* 402 U.S. 351, 361-2 (1971) (MARSHALL, J. concurring).

The petitioner's position as stated, but not argued, in his brief, is that *Stanley* v. *Georgia, supra,* should be expanded to the ultimate limits that its reasoning will support. *Cf. Karalexis* v. *Byrne, supra,* 306 F.Supp. 1363. It appears, however, that this Court has already declined to accept completely the argument that the right to possess films for one's own use, protected in *Stanley,* entails a right to show them commercially to others. Thus, in *United States* v. *Reidel, supra,* the Court held that the language in *Stanley* that the Constitution protects a citizen's right "to receive information and ideas" [394 U.S. at 564] did not give Reidel the constitutional right to send obscene materials through the mails. The Court reiterated [402 U.S. at 354] the language in *Stanley* that "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the

* The Court has granted certiorari in three cases, to be argued October 19, 1972, which present this question. *Alexander* v. *Virginia,* No. 71-1315; *Kaplan* v. *California,* No. 71-1422; *Paris Adult Theatre I* v. *Slaton,* No. 71-1051.

individual in the privacy of his own home." 394 U.S. at 568. From this it would follow that petitioner's apparent claim here, that the commercial showing of the film is protected, is contrary to the Court's most recent exposition.

This reading of *Reidel* is supported by *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), which upheld the customs seizure of obscene photographs. The plurality opinion of four justices found that importation of obscenity for commercial or private use may be banned, since *Stanley* protects the privacy of the home and "a port of entry is not a traveler's home." 402 U.S. at 376. Two justices concurred, finding that the Court need not have reached the question of the private use of the pictures, but they suggested that importation of obscenity for commercial use may be banned. Here again, the Court has held that commercial exploitation of obscenity may be banned despite the seeming sweep of *Stanley*.

Unless the Court overrules the *Roth* line of cases, the rights so explicitly set forth as the basis for *Stanley* do not apply to commercial display of an obscene film to the public. As narrowed by *Reidel* and *Thirty-Seven Photographs*, *Stanley's* holding is that "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch." 394 U.S. at 565. But, in the context of a movie that is openly advertised as a "stag movie," the State may tell the exhibitor what films he may not display. *Roth*, *Mishkin*, *Jacobellis*, *Memoirs*, *Ginzberg*, *Stanley* and *Reidel* have reiterated that there is a valid state interest in controlling obscenity. But

what control is there if the obscene films may be held out to the public in a commercial setting?

In *Roth*, the Court, analyzing the historical sources of the First Amendment, held that the Bill of Rights did not foreclose prosecutions for obscenity. See also, *Smith* v. *California*, 361 U.S. 147, 152 (1959); *Jacobellis* v. *Ohio*, *supra* at 186-7 (BRENNAN, J.). Nothing in any of the Court's subsequent obscenity decisions has rejected that holding or its underpinnings. As Mr. Justice MARSHALL, writing for the Court in *Stanley*, noted:

> "None of the statements cited by the Court in *Roth* for the proposition that 'this Court has always assumed that obscenity is not protected by the freedoms of speech and press' were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. Moreover, none of this Court's decisions subsequent to *Roth* involved prosecution for private possession of obscene materials." 394 U.S. at 560-1.

There have, however, been recent studies suggesting that obscene materials do not necessarily lead to deviate sexual behavior or violent sexual crimes. See, *e.g.*, the studies summarized in The Impact of Erotica, Report of the Effects Panel, The Report of the Commission on Obscenity and Pornography [Report], Government Printing Office, 1970, pp. 139-263. But these studies do not answer the question whether the Constitution, as written and interpreted, prohibits obscenity prosecutions if the material is shown to consenting adults. The studies, to the extent that they reach any conclusion, establish only that exposure to obscenity

does not present a clear and present or probable danger of antisocial conduct. As the Court stated in *Roth*:

> "But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais* v. *Illinois, supra* [343 U.S. 250 (1954)] at 266:
>
> > 'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances.' " 394 U.S. at 560-1.

The suggestion by 12 of the 17 members of the Commission on Obscenity and Pornography "that federal, state, and local legislation prohibiting the sale, exposition or distribution of sexual materials to consenting adults should be repealed" [Report, *supra*, at 51-3] was left, by the Commissioners themselves, to the state and federal legislatures. And correctly so. The decision to depart from the well-established, indeed over 250-year-old practice [see Acts of and Laws of the Province of Mass. Bay, c. CV, §8 (1712), Mass. Bay Colony Charter & Laws 399 (1814)], is properly one for the deliberations of the elected representatives of the People. The substantial, difficult policy questions involved in such a debate are addressed to the desirability of preventing the dissemination of materials whose "predominant appeal is to prurient, shameful or morbid interest in nudity, sex * * *" [see N.Y. Penal Law §235.00(1)] and which otherwise meet the obscenity tests. The power of Legislature to choose, it appears, was settled in *Roth*. It may

well be that some States, swayed by the Report's conclusions, may choose to delete the crime of obscenity insofar as it applies to consenting adults. Others, however, may choose to exercise their power "to promote the health, safety, morals and general welfare of its people" [*Near* v. *Minnesota,* 283 U.S. 697, 707 (1931)] and may seek to prevent the dissemination of material that appreciably lowers the general level of public morality. While the Court has held that private morality may be jeopardized in the confines of one's home, it has declined to foreclose control of the public, commercial, advertised spread of obscenity.

It cannot be presumed that the mere notice to potential adult viewers that a film is obscene or has explicit sexual content is sufficient. The notice would not remove the film from the stream of public display and would not prevent what the State deems to be harmful dissemination. The notice itself, by announcing the sexual content of the film, will induce some persons to enter the theater. Indeed, under the current movie-rating system, some exhibitors in New York have lowered their rating to an "X" to attract those who are looking for more sexual content than actually is in the film. It is uncertain, therefore, whether notice to the public of a film's sexual content will serve to warn unwilling viewers or to attract those marginally interested in obscenity. Under the circumstances, the Court should not hold that the Bill of Rights mandates a system of rating the sexual content of films.

POINT II

A judge may constitutionally issue a warrant directing the seizure of a film which he has seen in its entirety and which he has found to be obscene.

A judge of the Criminal Court of the City of New York attended a regular showing of "Blue Movie" at a movie theater in Greenwich Village in New York City. Immediately after seeing the entire—nearly two-hour long—film, the judge issued a search warrant for the seizure of the film and warrants for the arrest of the theater manager, projectionist and ticket taker. The petitioner asserts that this procedure violated the First, Fourth and Fourteenth Amendments of the Constitution.

It is beyond question that the issuance of the warrants complied with the Fourth Amendment. The constitution requires that the warrant be issued by a "neutral, detached magistrate instead of being judged by the officer engaged in the often compeitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948); *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1932); *Giordenello* v. *United States,* 357 U.S. 480, 485-6 (1958); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 449-53 (1971). In the case at bar the judge, rather than relying on a police officer's statements as to what he had seen or what unnamed "reliable" informants had told him about the material to be seized and the place to be searched, saw the corpus of the crime, at the place where the seizure was to occur. Surely, this more than met the Fourth Amendment's requirement that there be "probable cause" that the specifically described evidence of crime which is to be seized will be at the place described in the warrant. "Probable

cause" exists when the facts are "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132, 162." *Brinegar* v. *United States*, 338 U.S. 160, 175-6 (1949); see *United States* v. *Ventresca*, 380 U.S. 102, 107-8 (1965); *Ker* v. *California*, 374 U.S. 23, 35 (1963); *cf. Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813). When the magistrate has determined that the movie he has just seen "was obscene as I saw it under the definition of 'obscene'" (10a),* he has more than reasonable ground to believe that it was properly subject to seizure as evidence of, and the instrument of, a crime [*cf. Warden* v. *Hayden*, 387 U.S. 294 (1967)], and that it would be found in the projection booth.** Thus, the traditional Fourth Amendment tests were met; indeed, petitioner suggests no defects.

The Court in *Marcus* v. *Search Warrant*, 367 U.S. 717, 730-3 (1961), noted that the "assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure" is impermissible. Different standards for seizures apply. In *Marcus*, the warrant

* In light of the finding that the film was actually obscene, this Court need not face the question, proposed by some courts, whether a finding of "probable cause" to believe that a film is obscene is sufficient to justify the issuance of a search warrant. Compare *Merritt* v. *Lewis*, 309 F.Supp. 1249 (E.D. Cal. 1970) with *United States* v. *Pryba*, 312 F.Supp. 466 (D.D.C. 1970); see Note, The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizures? 46 N.Y.U.L. Rev. 80, 85-88 (1971).

** The Fourth Amendment's requirements would be satisfied if the judge, relying upon an affidavit of a police officer who saw the film and described it in detail, signed the warrant without seeing the film personally. This is the procedure that is followed in California. See *Schackman* v. *Annebergh*, 258 F.Supp. 983, 989-90 (C.D. Cal. 1966); *People* v. *DeRenzy*, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (1969), hearing denied by Calif. Sup. Ct. Sept. 24, 1969; *People* v. *Luros*, 4 Cal. 3d 84, 88, 92 Cal. Rptr. 833, 835 (1971).

allowed the seizure of 11,000 copies of 280 different publications; the warrant was issued without the magistrate's seeing the material, and—since the officer merely averred that he had bought certain books in a given store—without an affiant specifically describing the contents of the material to be seized, and without the warrants themselves adequately describing the material to be seized. "They left to the individual judgment of each * * * [officer] the selection of such magazines as in his view constituted 'obscene * * * publications.' " 367 U.S. at 732. The Court, although noting that a question was raised whether an adversary hearing is necessary prior to the issuance of a warrant, did not decide it [367 U.S. at 731-2], but found error in the absence of a procedure "designed to focus searchingly on the question of obscenity." *Id.* at 732. This type of procedure is required because of the difficulty in correctly concluding that something either is or is not obscene. The Constitution demands more than a police officer's conclusions that something is obscene. The New York procedure at issue here is one that allows a magistrate to focus on the issue.

In the light of this Court's decision in *Marcus,* the New York Court of Appeals adopted a rule that prior to the issuance of a warrant for the seizure of obscenity, the magistrate must actually see the material to be seized, and the warrant must specifically describe it. *People* v. *Rothenberg,* 20 N.Y.2d 35 (1967); see *People* v. *Abronovitz,* 31 N.Y. 2d 160 (1972). When a magistrate sees a film for the purpose of determining whether to issue a warrant for evidence of a crime that has been committed in his presence [not as petitioner asserts "in his role as censor" (brief, p. 11)], the procedure is indeed one "designed to focus searchingly on the question of obscenity." In *Lee*

Art Theatres, Inc. v. *Virginia,* 392 U.S. 363 (1968), the court considered the seizure of two films that had occurred on the authority of a warrant issued by a justice of the peace. The affidavit requested a warrant for "lewd and obscene motion pictures" which were described only by name; the officer averred that probable cause was found from "personal observation of repetition of the above mentioned motion picture and previews" and from "observation of the billboard in front of the theatre." Petition for certiorari, Appendix 2a-3a. Describing the officer's affirmation as nothing more than conclusory assertions, the Court invalidated the warrant and the resulting seizures on the authority of *Marcus.* The Court did not set out guidelines for further cases, did not discuss whether prior adversary hearings were constitutionally required, and did not even hold the *Rothenberg* rule to be required.

> "It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' * * * and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Lee Art Theatres, Inc.* v. *Virginia, supra,* at 637.

The deficiencies found in *Lee Art Theatres* that somewhat paralleled those in *People* v. *Abronovitz, supra,* are obviously absent here. Thus, the Fourth Amendment's

teachings, as applicable to obscenity cases, have been scrupulously followed by New York.

There remains then the question whether the First Amendment requires the application of special procedures not required under the Fourth.

The question has arisen since the Court's decision in *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964). In that case an information was filed by Kansas Attorney General alleging that 59 obscene books were located in a particular county, and seeking the condemnation of the material. Following a 45-minute perusal of seven books, a magistrate issued a warrant authorizing the seizure of all 59 items. When the warrant was executed, 31 titles were seized and, in all, more than 1700 books were impounded. The plurality opinion of Mr. Justice BRENNAN, for four justices of the court, recognized that this massive seizure was "more repressive that an injunction preventing further sale of the books," and held that the seizures which were made without a previous adversary judicial hearing were not constitutionally valid.

The application of the Fourth Amendment was not passed upon [378 U.S. at 210 n. 2, 213], the holding being grounded on the "danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books." *Id.* at 213. Three justices concurred in the result—two on the ground that any suppression of allegedly obscene material is unconstitutional, Mr. Justice STEWART on the ground that the material was not "hard core" pornography. Two justices dissented.

It appears that the primary basis for decision was the belief that a massive seizure was inherently confiscatory and deprived society of its constitutional right to receive material. This interpretation is confirmed by *Mishkin* v. *New York*, 383 U.S. 502, 512-13 (1966), where the Court refused to review the legality of a seizure challenged under *A Quantity of Books* since the record did not reveal the number of books seized under the warrant, or show whether the seizure was massive or "whether the books seized * * * were on the threshold of dissemination." Of course, if *A Quantity of Books* applied to all seizures of obscene material, there would have been no need for the court to abstain from review, since the parties had conceded that there was no prior adversary hearing. Additionally, the absence of a reference to *A Quantity of Books* in the decision in *Lee Art Theatres, supra*, gives added force to the conclusion that *A Quantity of Books* did not settle whether there is an absolute right to an adversary hearing in all obscenity cases.

However, subsequent to the decision in *A Quantity of Books*, six federal courts of appeals, relying upon the plurality opinion in *A Quantity of Books* and upon *Marcus*, have held that this Court has already required adversary hearings prior to the seizure of allegedly obscene material. The federal courts have precluded state prosecutions that do not conform to their view of this Court's holdings.*

* Despite the Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971) and the related cases [*e.g. Byrne* v. *Karalexis*, 401 U.S. 216 (1971)], the federal courts, at least in New York, have continued to impose their view on the state's pending prosecutions. They use the rubric of requiring a return of the property rather than using the pre-*Younger* language of injunction. See, *e.g. MOD Amusement Corp.* v. *Murphy*, 335 F.Supp. 1267 (S.D.N.Y. 1971), motion for stay denied January 12, 1972 (2d Cir.).

See, *e.g.*, *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Cambist Films* v. *Duggan*, 420 F.2d 687 (3d Cir. 1969); *Tyrone, Inc.* v. *Wilkinson*, 410 F.2d 639 (4th Cir. 1969), *cert. denied*, 396 U.S. 985 (1969); *Metzger* v. *Pearcy*, 393 F.2d 202 (7th Cir. 1968); *United States* v. *Alexander*, 428 F.2d 1169 (8th Cir. 1970); *Demich, Inc* v. *Ferdon*, 426 F.2d 643 (9th Cir. 1970), rev'd on other grounds, 401 U.S. 990 (1971). Several state supreme courts, relying on the same authorities, have reached the opposite conclusion. See, *e.g.*, *Roaden* v. *Commonwealth*, 473 SW 2d 814 (Ky. 1971), *cert. granted* 406 U.S. 905, No. 71-1134; *Commonwealth* v. *State Amusement Corp.*, 356 Mass. 715, 248 NE 2d 497 (1969); *State* v. *Rabe*, 79 Wash. 2d 254, 484 P.2d 917 (1970) rev'd on other grounds, 405 U.S. 313 (1972); *State* v. *Burgin*, 255 S.C. 237, 178 SE 2d 325 (1970), rev'd on other grounds 404 U.S. 806 (1971); *State* v. *Albini*, 31 Ohio St. 2d 27, 285 NE 2d 327 (1972). Petitioner, relying mainly upon the Second Circuit's opinion in *Bethview* and on *A Quantity of Books*, argues that an adversary hearing is always necessary if obscene material is to be seized. The cases upon which he relies do not compel this Court to deviate from its well established holding that it is the judicial presence and not the adversary's which is necessary before the issuance of a search warrant .

It is well settled that the States may validly impose regulations that have an incidental effect on free speech if the regulation is pursuant to a valid governmental interest that is not aimed at suppressing protected speech. A recent formulation of this principle appeared in *United States* v. *O'Brien*, 391 U.S. 367, 376-7 (1968):

"This Court has held that when 'speech" and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms * * * [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." See also *Street* v. *New York*, 394 U.S. 576, 594-617 (1969) (dissenting opinions); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969); *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

The control of obscenity is such an interest. As noted in Point I, *supra*, obscenity is not protected under the First Amendment and may be validly regulated. The constitutional question is whether a particular regulatory device has sufficient incidental side-effects that infringe on protected speech, that the device must be banned. As the Court noted in *Smith* v. *California*, 361 U.S. 147, 154-5 (1959), "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene * * *." The Court has not, however, banned the enforcement of such statutes.

The question whether the First Amendment requires an adversary hearing prior to the seizure of a film, even if a judge has seen the film and found it obscene, must be an-

swered in the light of these principles. Regulation of obscenity, and the seizure of an obscene film, are "unrelated to the suppression of free expression." If permitting the seizure of obscene films results occasionally in the seizure of a film later determined not to be obscene, that restriction is "incidental." Nor would it be significantly reduced by adversary hearings. On the other hand, imposing cumbersome prior hearings would significantly interfere with the exercise of "the constitutional power of the government" to prohibit obscenity. To these considerations we now turn.

The conclusion that the seizure of a single print of a film is always equivalent to the massive seizure condemned in *A Quantity of Books* is unsound. While the seizure of all prints of a film may have the same effect as seizing the entire stock of magazines in *Marcus* and *A Quantity of Books*, films for commercial distribution are readily available in additional prints. In fact, "Blue Movie" has been shown in numerous locations, even though the seized print remains in the custody of the State. The Court of Appeals for the Second Circuit in *Astro Cinema Corp., Inc.* v. *Mackell, supra,* rejected the argument that the availability of other prints may allow a different result. The court noted that "by the same token, another shipment of magazines or books in *Marcus* and *A Quantity of Books* might have been obtained from the distributor or publisher. The point in each instance is that the State wishes to interfere with the distribution of films or books. It must first provide, as we have been instructed, an adversary hearing capable of affording a reasonable likeli-

hood that non-obscene books will reach the public." 422 F.2d at 295-6. In so ruling, the court too readily equated a print of a film and a storehouse of books. Seizure of one print of a film is more appropriately equated with seizure of one copy of a book—even the last copy in the store.

As this Court pointed out in *Joseph Burstyn, Inc.* v. *Wilson,* 343 US 495 (1952), although the First Amendment's protections cover movies, it does not

> "follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." *Id.* at 503; *Freedman* v. *Maryland,* 380 US 50, 61 (1965); *Time Film Corp.* v. *Chicago,* 365 U.S. 43, 49 (1961).

The State, in fact, is not trying to "interfere with the distribution" of the film in question. It is, instead, attempting to preserve for trial evidence of the exhibitor's violation of the Penal Law. Where the exhibitor can readily obtain another print of the film, it would be unreasonable to hold that the public's First Amendment rights —the rights protected by *A Quantity of Books*—were violated. The practical reality of commercial distribution of movies is that the exhibitor is in the best position to obtain another copy of the work, if he intends to continue displaying it. But the prosecution, in order to sustain its burden of proof at trial, must show that the film seen by its witnesses on the date charged in the complaint is obscene. Thus, it is reasonable to allow the seizure of that print, leaving the exhibitor to obtain others, should he so decide. If the prosecution is relegated to obtaining a different

print, or obtaining the shown print at a later time, it often could not ascertain whether the substitute print was identical to the one which is the subject of the criminal charges. The fear of change in the film—innocent or otherwise—is not totally without foundation, as *Demich, Inc.* v. *Fendon, supra,* 426 F.2d at 647 (CARTER, J., dissenting) points out. In *Demich* one of the plaintiffs had deleted the most objectionable parts of the film after the officer saw it but before it was seized. See also the incident described in Motion and Brief of Charles Keating, Amicus Curiae, *Roaden* v. *Kentucky,* No. 71-1134, p. 72 n.33. Of course, in some cases there may be only one print. This can be determined only by an analysis of the facts of the case. There is nothing in the record to show the facts as to the distribution of "Blue Movie." Petitioner states: "In the case as bar, the seizure of the film effectively precluded the showing of the movie since there was no other print readily available (158a, 159a)" (brief, p. 10). Neither the cited pages which are the trial court's opinion, nor any part of the evidence support the assertion. In any event, the question requires a case-by-case analysis, something the federal Courts of Appeals find irrelevant. But that shows the fallacy of petitioner's argument, for a proper balancing of First and Fourth Amendment considerations against the State's right to prosecute obscenity, which the federal courts purport to sustain, would require such an analysis. See, Note, The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizure, 46 N.Y.U.L. Rev. 80, 99-100 (1971).

Not only has petitioner failed to establish that the print of "Blue Movie" was irreplaceable, but he has failed to

show that an adversary hearing would have helped him, or that the requested procedure would materially increase First Amendment protection in the future. The Court has required adversary hearings only for good reason, such as prior to the issuance of an injunction to prevent a political rally. *Carroll* v. *Commissioners of Princess Anne,* 393 US 175 (1968). The Court's analysis of the reason for precluding *ex parte* orders there is relevant in the case at bar:

> "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the are of First Amendment adjudication." *Id.* at 183

In *Carroll* the development of the facts at the hearing was crucial to the outcome of the matter. The Court indicated that "there is danger in relying exclusively on the version of events and danger presented by prosecuting officials." *Id.* at 183 n. 10. In the case at bar the primary facts could not be in dispute on the question of obscenity—the only question relevant in a First Amendment adjudication. The

film itself is the essential evidence on the question, and the magistrate saw that. Too, in an obscenity prosecution, there can be no real discussion on whether the remedy, although drastic, should be used. Thus the question is whether defense evidence or argument is necessary. It seems strange that evidence of experts on the non-obscenity of the film can be received before the film is itself held as evidence. Yet that is precisely what happened in an adversary hearing held in New York County. Three days of expert testimony, which was given six weeks after the start of the hearing, and, after three weeks the court ordered the film seized. *People* v. *Shiffrin*, 64 Misc. 2d 311 (Crim. Ct. N.Y. Co. 1970); see also, *State* v. *Albini*, *supra*, 285 N.E.2d at 329 n. 2. That type of proceeding is surely not what the Constitution requires. And, as to the possibility that defense legal argument is needed to allow determination of the imprecise legal standard, the New York Court of Appeals cogently noted:

> "But when a magistrate sees a film, it is not much help to him, or indeed to the parties, in deciding probable cause to have counsel on one side tell him what he has just seen is obscene and on the other that it is not. He is deciding, on the warrant question, not guilt or innocence, but the *prima facie* sufficiency of ground to procute based on probable couse. The legal issue of obscenity on the merits of the charge can be determined when the prosecution begins by appropriate motion" (184a-185a).

Moreover, under petitioner's position, if a prior adversary hearing is required, why not prior appellate review?

There are other reasons why prior adversary hearings are not required. No deprivation of the public's basic

First Amendment rights can be complained of if the legality of the act that removed the material from public circulation may be immediately litigated. *Cf. Freedman* v. *Maryland, supra* at 60; *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139, 142 (1968); *Byrne* v. *Karalexis, supra* at 221 (dissenting opinion); compare *Kingsley Arms Inc.* v. *Brown,* 354 U.S. 346 (1957). Although New York's criminal procedures set no statutory time limite within which a hearing must be held to determine the validity of a seizure, no prompt hearing was requested by petitioner. The prosecutor in New York County has said on numerous occasions that we stand ready to grant immediate hearings, on request, on defense motions to suppress material arguably protected by the First Amendment. No such motion was made by petitioner, when he was brought before the Court and arraigned on the date of his arrest, nor was one made thereafter. The chronological record of the proceedings below (1a) shows that on arraignment, July 31, 1969, the case was adjourned for 55 days to September 24; no plea was entered; no objection by petitioner was noted. However, on August 19, apparently by consent, the case was advanced to the calendar for that date, and the petitioner pleaded not guilty, requested a three-judge panel, waived "all motions," and adjourned the case to September 4. The actual trial occurred on September 16 and 17, and the guilty verdict, rendered September 17, was entered only 48 days after the seizure. The State made every effort to expedite the proceedings. Similarly, it is clear that the time involved is well within the limits this Court set in forfeiture proceedings under the customs laws—less than 14 days from the seizure to the institution of judicial proceedings and less than 60 days from the filing of the action to final

decision in the district court. *United States* v. *Thirty-Seven Photographs*, 402 363, 373-4 (1971). Of course, in that case the Court specifically noted:

> "In other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today." 402 U.S. at 374.

But, the deadlines set in *Thirty-Seven Photographs*, which the Court held to be consistent with *Freedman* v. *Maryland*, *supra*, and *Teitel Film Corp.* v. *Cusack*, *supra*, provide guides to proper conduct. In a criminal case, at least in New York, the charge will be initiated contemporaneously with the seizure, eliminating one form of delay found in the customs cases. Petitioner's knowing decision to waive pre-trial motions and reserve the issues for trial (6a-7a) does not entitle him to any benefits because of the delay. Indeed, even in *Thirty-Seven Photographs*, *supra*, the court excluded from the time limits the delay caused by the claimant. 402 U.S. at 374.

Mr. Justice WHITE in an analogous context has noted:

> "In considering searches incident to arrest, it must be remembered that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene and having been arrested, he will soon be brought into contact with people who can explain his rights. As Mr. Justice BRENNAN noted in a dissenting

opinion, joined by The Chief Justice and Justices BLACK and DOUGLAS, in *Abel* v. *United States*, 362 US 217, 249-50 (1960), a search contemporaneous with a warrantless arrest is specially safeguarded since '[s]uch an arrest may constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, see *Henry* v. *United States*, 361 US 98, 100; and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into. Fed. Rules Crim Proc 5(a) and (c) * * * *Mallory* v. *United States*, 354 US 449; *McNabb* v. *United States*, 318 US 332.'

* * *

"An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding * * *." *Chimel* v. *California*, 395 U.S. 752, 782-3 (WHITE, J., dissenting).

The seizure of a film and the subsequent immediate hearing provide the most expeditious possible disposition of the obscenity question. The person whose property has been seized is under heavy pressure, if he chooses to vindicate his or the public's rights, to proceed to a hearing. The person served with notice of a prior adversary hearing, on the other hand, is prone to seek delay, because the economic benefits which may accrue from the continued display of the material inure to his benefit alone and are hardly the public rights protected by the First Amendment.

Similarly, The American Law Institute's formulation of a rule for seizure of allegedly obscene material is im-

practical and goes far beyond anything this Court has contemplated. ALI, Model Code of Pre-Arraignment Procedure, Prop. Off. Draft No. 1, 1972, §SS200.6. That formulation was provided since it was felt that *A Quantity of Books* requires adversary hearings where massive seizures are made. See Commentary, *id.* at pp. 180-2. The Code allows *ex parte* issuance of warrants if there has been a determination in some other local, prior judicial proceeding that the object is obscene, and that judgment "has become final and has not been stayed." It also allows *ex parte* seizures for quantities sufficient for "evidentiary use" in the proceeding, but provides that if the effect of seizing such copies may be to stop or substantially to impede the showing or distribution of the instruments in question, the warrant shall provide that reasonable opportunity be given the possessor of such instruments to furnish duplicate copies for seizure, or to show them during thep roceeding at such times and places as the tribunal conducting the proceeding may direct."

There are two difficulties. Since immediate adversary hearings can be provided after the seizure, the cost and delay of duplication of the material are unnecessary. After the adversary hearing on a suppression motion the non-obscene material will be returned, only the probably obscene will be held. But, once there is a finding of probable obscenity, the prosecutor would be subject to strong criticism if he allowed duplication of the material and the continued violations of the penal laws. The prosecutor should not be a party to future illegality. Also, to allow the exhibitor to keep the evidence pending

trial raises serious questions noted above, about the identity of the trial version of the film. In a film as long as and disjointed as "Blue Movie," additions or deletions could easily go unnoticed. And, despite suggestions that contempt or other sanctions will prevent tampering with the film, the reality of law enforcement experience is that an obscenity defendant's honesty is not to be trusted.

It may be possible in extreme cases to prove the crime of obscenity without the film itself as evidence. See, *e.g. People* v. *Morgan*, 68 Misc. 2d 667, 326 N.Y.S.2d 976 (Crim. Ct. N.Y. Co. 1971), *aff'd* N.Y.L.J. Jan. 18, 1972, p. 2, col. 3 (App. Term, 1st Dept.). But the prosecution cannot rely upon the fortuity that the movies shown will be as explicit, prurient and gross and have as little plot as "Anna's Bannana," the film in *Morgan*. The prosecution should not be forced to rely on a police officer's memory, either at the trial, or at a hearing, particularly when, as here, the obscene material is available to be used as evidence. The upshot of the adversary hearing rule has been to force prosecutors to use less direct, and less probative evidence than they are entitled to.

The practical problems so easily brushed aside by the federal Courts of Appeals present a bar to prosecution. In New York City, which apparently has become the center for the display of material obscene by any standard, the litigation engendered by the federal court's interventions has effectively thwarted prosecution. Subpoenaes for the production of the film at trial or even at an adversary hearing cannot be used. Our experience has been that

service cannot be made upon non-existent, or disappearing corporations, which readily vanish on the approach of the process server or which have no agents for service and actually have legal custody of the films. Assuming a valid service, the corporation can often dispose of the film after its commercial value is gone [*Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546, 549 (S.D.N.Y. 1969)], and can validly rely upon the rental agreement which requires them to return it to the distributor on a day certain. *Cf. People* v. *Steinberg*, 60 Misc. 2d 1041, 1045-6, 304 N.Y.S.2d 858, 863 (Co. Ct. West. Co. 1969). The assumption of the federal courts, that the obscenity defendants will cooperate with law enforcement, is hardly an accurate one.

The Constitution does not require an adversary hearing before evidence is seized. Nor does it require such a hearing in all cases involving the seizure of obscenity. The First and Fourth Amendments do require the use of delicate tools if the State chooses to regulate obscenity. A proceeding in which a Judge sees an entire film before ordering its seizure is such a tool.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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